[redacted]

(27,501)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 746.

HARRY KRICHMAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 27, 1920.

6 TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, Defendant-in-Error,

vs.

HARRY KRICHMAN, Plaintiff-in-Error.

On Indictment.

In Error to the District Court of the United States for the Southern District of New York.

Francis G. Caffey, David C. Cahill, Attorneys for Defendant-in-Error.
Edward Schoen, Attorney for Plaintiff-in-Error.

1 *Docket Entries.*

Crim. Doc. 15-255.

UNITED STATES OF AMERICA

vs.

HARRY KRICHMAN.

Francis G. Caffey, U. S. Attorney.
David V. Cahill, assistant attorney.
Edward Schoen, attorney for defendant, 207 Market St., Newark, N. J.
Offering and giving bribe to U. S. agent. Stealing interstate baggage.
Sec. 39, U. S. C. C.
Act Feb. 13, 1913.

1918.
Jan. 6. Filed indictment.
Dec. 14. Filed recognizance for appearance before District Court.
1919.
Jan. 15. Defendant pleads not guilty.
Mch. 6. Trial begun. L. Hand, D. J.
Verdict—guilty—with recommendation to mercy of Court. Mch. 14, '10—Sentence.
Mch. 14. Sentenced to one year and one day, U. S. Pen., Atlanta, Ga. Bail $5,000. Pending appeal. (L. Hand, J.)

An extract from the docket entries.

ALEX GILCHRIST, JR.,
Clerk.

[SEAL.]

2 *Petition for Writ of Error.*

Filed April 30, 1919.

District Court of the United States, Southern District of New York, Criminal Branch.

UNITED STATES OF AMERICA, Plaintiff,
against
HARRY KRICHMAN, Defendant.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

And now comes the above named defendant, Harry Krichman, by his attorney, Edward Schoen, and complains that in the record and proceedings had in the trial of the above entitled cause, and also in the verdict of the jury therein rendered on the sixth day of March, 1919, the order entered on the motion in arrest of judgment and also in the rendition of the judgment in the above entitled cause in the said United States District Court for the Southern District of New York, had at the March Term thereof, against the said defendant, on the 14th day of March, 1919, manifest error hath happened to the great damage of the said defendant, Harry Krichman.

Wherefore, the said defendant prays for the allowance of a
3 writ of error and for such other orders and processes as may cause the record and proceedings in said case to be sent to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit under and according to the laws of the United States in that behalf made and provided, so that, the same being inspected, the said Judges of the said Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct that error, what of right and according to law ought to be done, and also that an order be made herein that all other proceedings in this action in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Second Circuit, and your petitioner will ever pray.

Dated April 29th, 1919.

EDWARD SCHOEN,
Attorney for Defendant.

Office and Postoffice address, 207 Market Street, Newark, N. J.

Writ of error to operate as a supersedeas allowed, returnable according to law, and the execution of the judgment herein against the defendant herein is hereby stayed pending the hearing and determination of the said writ of error in the Circuit Court of Appeals for the Second Circuit, the defendant, Harry Krichman, to furnish bond in the sum of $5,000, conditioned according to law, and subject to the approval of the United States Attorney for the Southern District of New York.

LEARNED HAND,
U. S. District Judge.

4

Writ of Error.

Filed April 30, 1919.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Judges of the District Court of the United States, for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between United States of America, plaintiff, and Harry Krichman, defendant, a manifest error hath happened, to the great damage of the said Harry Krichman, as is said and appears by his complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 30th day of May, 1919, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

5 Witness, the Honorable Edwin D. White, Chief Justice of the United States, this 30th day of April, in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States the one hundred and forty-third.

[L. S.]

ALEX GILCHRIST, JR.,
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

LEARNED HAND,
Judge U. S. District Court.

Citation.

Filed April 30, 1919.

By the Honorable Learned Hand, U. S. District Judge Holding, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To United States of America, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the district and circuit above named, on the 30th day of May,
6 1919, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein Harry Krichman is plaintiff-in-error and you are defendant-in-error, to show cause, if any there be, why the judgment of said wit of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the district and circuit above named, this 30th day of April, in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States the one hundred and forty-third.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit, holding the District Court.

7 *Assignments of Error.*

Filed April 30, 1919.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA

vs.

HARRY KRICHMAN.

Now comes the defendant, Harry Krichman, by his attorney, Edward Schoen, in connection with their petition for a writ of error, and make the following assignments of error, which he aver occurred upon the trial of this cause, to wit:

1. The Court erred in denying defendant's application for the dismissal of the indictment and quashing of same, which was found against the defendant, and upon which he was tried.

2. The Court erred in denying the motion of the defendant, at the close of the case, to dismiss the indictment and direct the acquittal of the defendant, on the ground that the testimony failed to show that any crime had been committed.

The defendant herein, Harry Krichman, reserves his right to amend, enlarge or change the assignment of error herein within such time as may be fixed by the Court, after the allowance of same by the United States Circuit Court of Appeals.

8 Dated New York, April 29th, 1919.

EDWARD SCHOEN,
Attorney for Defendant, Plaintiff-in-Error.

Order to File Amended Assignments of Error.

Filed April 30, 1919.

At a stated Term of the United States District Court held in and for the Southern District of New York, at the United States Court House and Postoffice Building, Borough of Manhattan, City of New York, on the 30th day of April, 1919.

Present: Hon. Learned Hand, U. S. Circuit Judge holding District Court.

UNITED STATES OF AMERICA

vs.

HARRY KRICHMAN.

Whereas, the above-named defendant, Harry Krichman, has this day sued out a writ of error to the United States Circuit Court of Appeals for the Second Circuit, and has duly served a citation upon the United States of America.

Now, upon motion of counsel for the defendant, it is ordered that the said defendant within ninety days file with Clerk of the United States District Court for the Southern District of New York

9 amended assignments of error, the same to be included in the transcript of the record in the place and stead of the assignments of error this day filed by the said defendant.

Dated this 30th day of April, 1919.

LEARNED HAND,
U. S. District Judge.

10 *Order and Consent—Extending Time to File Record.*

Filed June 6, 1919.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court Rooms in the U. S. Court House and Postoffice Building in the Borough of Manhattan, City of New York, on the 6th day of June, in the year of our Lord one thousand nine hundred and nineteen.

Present: Hon. C. M. Hough, C. Judge.

Indictment, No. —.

UNITED STATES OF AMERICA

vs.

HARRY KRICHMAN.

Upon reading and filing the annexed consent to the entry of the order signed by Francis G. Caffey, U. S. Attorney, and on motion of counsel for the defendant, it is

Ordered that the return day of the writ of error and citation is hereby adjourned from May 30, 1919, to August 1st, 1919, and that the time of the plaintiff-in-error to docket the case and file the record with the Clerk of the U. S. Circuit Court of Appeals for the Second Circuit be and the same is hereby enlarged and extended to and including the first day of September, 1919.

C. M. HOUGH,
U. S. C. J.

11 We hereby consent to the entry of the foregoing order. Dated N. Y., June 6th, 1919.

(Signed) FRANCIS G. CAFFEY,
U. S. Attorney.

Filed, U. S. District Court, S. D. of N. Y., June 6, 1919.

12 *Order Extending Time to File Record to September 20, 1919.*

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court Rooms in the U. S. Court House and Postoffice Building in the Borough of Manhattan, City of New York, on the thirty-first day of July, in the year of our Lord one thousand nine hundred and nineteen.

Present: Hon. Julian Mack, Judge.

Indictment, No. —.

UNITED STATES OF AMERICA

vs.

HARRY KRICHMAN.

Upon reading and filing the affidavit of Edward Schoen, attorney for the defendant, and upon good cause shown therefor, on motion of counsel for the defendant, it is

Ordered that the return day of the writ of error and citation is hereby adjourned from August 1, 1919, to September 20th, 1919, and that the time of the plaintiff-in-error to docket the case and file the record with the Clerk of the U. S. Circuit Court of Appeals for the Second Circuit and to file amended assignment of error, be and the same is hereby enlarged and extended to and including the twentieth day of September, 1919.

JULIAN MACK,
U. S. C. J.

Inclosure 15,540 from United States Attorney, New York City.

13 *Indictment.*

In the District Court of the United States of America for the Southern District of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors for the United States of America duly empaneled and sworn in the District Court of the United States for the Southern District of New York and inquiring for said district upon their oath present:

That heretofore on November 8th, 1918, at the Southern District of New York and within the jurisdiction of this Court, Harry Krichman did unlawfully, wilfully, corruptly and knowingly promise and offer money, the amount thereof not being specified in said promise and offer, to Herman Zwillinger, who was then and there a person acting for and on behalf of the United States in an official function

under and by authority of the office of the Director General of Railroads of the Government thereof, to wit, a baggage porter employed on and by the Pennsylvania Railroad Company, a common carrier which was then and there operated by the Director General of Railroads of the United States.

That the said promise and offer of money were made with intent on the part of the said Harry Krichman to induce the said Herman Zwillinger to do an act in violation of his lawful duty as such baggage porter, that is to say to induce the said Herman Zwillinger to give and deliver to the said Harry Krichman in the City of New York, State of New York, certain trunks which would be designated
14 by the said Harry Krichman and which would come into possession of the said Pennsylvania Railroad Company as baggage to be transported from the State of New York to other States of the United States, and which said trunks it would be the lawful duty of said Herman Zwillinger to cause to be transported and to aid in transporting as baggage from the State of New York to other States of the United States, as the said Harry Krichman then and there well knew against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 39, U. S. C. C.)

Second Count.

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore on November 27th, 1918, in the Southern District of New York and within the jurisdiction of this Court, Harry Krichman did unlawfully, knowingly, corruptly and wilfully promise and offer to Herman Zwillinger, who was then and there a person acting for and on behalf of the United States in an official function under and by the authority of the office of the Director General of Railroads of the Government thereof, to wit, a baggage porter employed on and by the Pennsylvania Railroad which was then and there operated by the Director General of Railroads of the United States, the sum of $50.00.

That the said promise and offer of money were made with intent on the part of the said Harry Krichman to induce the said Herman Zwillinger to do an act in violation of his lawful duty as such baggage porter, that is to say, to induce the said Herman Zwil-
15 linger to give and deliver to the said Harry Krichman a certain trunk containing furs which was then and there in the possession of the Pennsylvania Railroad Company, a common carrier, which was then and there operated by the Director General of Railroads of the United States as baggage and was in course of transportation from the State of New York to the State of Pennsylvania, and that the said trunk was the property of Gerber & Silberberg.

That the said trunk was not the property of the said Herman Zwillinger or of the said Harry Krichman, as the said Harry Krichman then and there well knew against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 39, U. S. C. C.)

Third Count.

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore on November 27th, 1918, in the Southern District of New York and within the jurisdiction of this Court, Harry Krichman did unlawfully, knowingly, corruptly and wilfully give to the said Herman Zwillinger, who was then and there a person acting for and on behalf of the United States in an official function under and by the authority of the office of the Director General of Railroads of the Government thereof, to wit, a baggage porter employed on and by the Pennsylvania Railroad which was then and there operated by the Director General of Railroads of the United States, the sum of $45.00

16 That the said money was given with the intent to induce the said Herman Zwillinger to do an act in violation of his lawful duty, that is to say to induce the said Herman Zwillinger to give and deliver to the said Harry Krichman a certain trunk containing furs which was then and there in the possession of the Pennsylvania Railroad Company, a common carrier, which was then and there operated by the Director General of Railroads of the United States as baggage and was in course of transportation from the State of New York to the State of Pennsylvania and that the said trunk was the property of Gerber & Silberberg.

That the said trunk was not the property of the said Herman Zwillinger or of the said Harry Krichman as the said Harry Krichman then and there well knew against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 39, U. S. C. C.)

Fourth Count.

And the grand jurors aforesaid on their oath aforesaid do further present that heretofore on November 27th, 1918, in the Southern District of New York and within the jurisdiction of this Court, Harry Krichman did unlawfully, wilfully and knowingly take and carry away from the depot of the Pennsylvania Railroad in the Borough of Manhattan, City of New York, State of New York, with intent to convert to his own use a certain trunk containing furs which was then and there in the possession of the Pennsylvania Railroad Company, a common carrier, which was then and there operated by the Director General of Railroads of the United States

17 as baggage and was in course of transportation from the State of New York to the State of Pennsylvania and that the said trunk was the property of Gerber & Silberberg.

That the said trunk was not the property of the said Herman Zwillinger or of the said Harry Krichman and that the said Harry Krichman had no right or title to the same as he then and there well knew against the peace of the United States and their dignity

and contrary to the form of the statute of the United States in such case made and provided. (Act of Feb. 13, 1913.)

FRANCIS G. CAFFEY,
United States Attorney.

1919
Jan. 15. Deft. pleads not guilty.
Mch. 6. Trial begun. Verdict, guilty, with recommendation to mercy of Court.
Mch. 14. For sentence.
" 14. Deft. sentenced—one year, one day, U. S. Pen., Atlanta, Ga. Bail fixed in sum of $5,000, pending appeal to U. S. C. C. A. (L. Hand, D. J.)
Apr. 30. Appeal papers filed.

L. HAND,
D. J.

18–112 Endorsed: 6827. C 15—255. Form No. 235.

U. S. District Court.

THE UNITED STATES OF AMERICA
vs.
HARRY KRICHMAN.

Indictment.

Offering and giving a bribe to a United States agent and stealing baggage from interstate shipment.
(§39 U. S. C. C.; Act of Feb. 13, 1913.)

FRANCIS G. CAFFEY,
U. S. Attorney.

A true bill.
WILLIAM SCOTT,
Foreman.

U. S. District Court, S. D. of N. Y. Filed Jan. 6, 1919.

* * * * * * *

113 *Stipulation.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Complainant,
vs.
HARRY KRICHMAN, Defendant.

Stipulation.

Whereas, before final judgment and sentence in this cause, Edward Schoen, attorney for the defendant, moved in arrest of judgment that the verdict of the jury be set aside on the ground:

1. That there was no evidence tending to sustain the charge in the indictment or tending to establish the guilt of the accused, and

Whereas, the motion was based upon the ground that the Government had failed to show that Zwillinger, to whom the alleged bribe was given, was a person acting for and on behalf of the United States in an official function in that there was no proof that the Pennsylvania Railroad Co. had been taken over and was being operated under the direction of the Government, and

Whereas, a motion in arrest of judgment was made upon the further ground that, upon the face of the indictment, no crime was charged for the reason that the indictment set forth that "the defendant did unlawfully * * * offer money to Herman
114 Zwillinger, who was then and there a person acting for and on behalf of the United States in an official function, * * * to wit, a baggage porter employed on and by the Pennsylvania Railroad Company, a common carrier, &c.," and

Whereas, the defendant contended that a baggage porter was not a person acting for and on behalf of the United States in an official function and therefore no crime was charged, and

Whereas, the official court stenographer was not present at the time said motions were made and no official record thereof is in existence,

Therefore, it is hereby stipulated and agreed by and between ——, United States District Attorney, and Edward Schoen, attorney for the defendant, that this stipulation may be annexed to and made a part of the transcript of the proceedings in this cause and the facts therein set forth may be considered upon the appeal of the same as though officially recorded by the stenographer.

Dated July 3rd, 1919.

FRANCIS G. CAFFEY,
United States District Attorney.
EDWARD SCHOEN,
Attorney for Defendant.

Dated July 3, '19.

So ordered:
L. HAND,
U. S. D. J.

115 *Opinion on Motion in Arrest of Judgment.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA
against
HARRY KRICHMAN.

This is a motion for a new trial upon conviction by the defendant upon three counts of an indictment, which alleged that he attempted

to bribe a baggage porter employed by the Director General of Railways at the Pennsylvania Terminal, New York. It was proved upon the trial that the defendant had approached one Zwillinger, who was then engaged as a baggage porter in the baggage room at the Pennsylvania Terminal in the City of New York, and offered to bribe him to deliver to the defendant from time to time trunks containing furs, which were checked from the Pennsylvania station to points outside the State of New York. Zwillinger, after the first interview, reported to his superiors, who directed him not to alarm the defendant and to let him proceed if he would. Afterwards, the defendant paid Zwillinger a sum of money and obtained from him delivery of a trunk containing valuable furs, which he took with him to the Grand Central Terminal in the City of New York. Shortly after he was apprehended by the Pennsylvania detectives, who had kept him under observation from the time he entered the Pennsylvania Terminal.

116 The Judge charged the jury that if they found the facts to be as stated above, the defendant was guilty. The defendant took no exception to the charge and although he moved for the direction of a verdict both at the close of the Government's case and at the close of his own case, he did not raise the point that Zwillinger was not acting in an official capacity on behalf of the United States under the authority of a department of the United States (Crim. Code, §39). He now moves for a new trial upon the ground that a baggage porter in the employ of the Director of Railways is not such a person within the section in question.

Edward Schoen for the motion.
David V. Cahill for the United States.

LEARNED HAND, *D. J.:*

A motion for a new trial is always in the discretion of the Court, Mattox v. U. S., 146 U. S. 140, and as the point now raised was not suggested upon the trial, and there was therefore no exception touching it, I might without more deny this motion. Nevertheless, the objection goes to the very essence of the charge, and could not have been corrected had it been raised upon the trial, and if it be good, the defendant has been illegally convicted. It seems to me, therefore, in the interests of justice to consider the matter upon its merits, rather than to subject the defendant to the posibility of suffering punishment for a crime which he could not commit.

The leading authority on Section 39 is U. S. v. Birdsall, 233 U. S. 223, in which a conviction was sustained. In that case the Commissioner of Indian Affairs, with the authority of the Secretary of the Interior, had appointed Brents and Van Werts

117 to be special officers for the suppression of liquor traffic among the Indians. In cases of convictions for violation of the law against selling liquor it had become the custom of the department to investigate through subordinates whether executive or judicial clemency should be exercised—this in the interests of the effective suppression of such traffic. The defendant Birdsall had

bribed Brents and Van Werts to obtain their influence in procuring such clemency and the Supreme Court in upholding the conviction decided that they were exercising official functions, although they were not expressly defined by any statute or even by a regulation, but had arisen from a custom of the department. Similarly, a member of the Board of Examining Surgeons appointed by the Commissioner of Pensions was held to be within the statute in United States v. Leuven, 62 Fed. R. 62, although such officials were not themselves officers of the United States, U. S. v. Germaine, 99 U. S. 508. In U. S. v. Ingham, 97 Fed. R. 935, the section was extended to a Secret Service operative employed by the Secretary of the Treasury, and in Haas v. Henkel, 216 U. S. 462, to an associate statistician employed by the Department of Agriculture to prepare and publish official reports of the cotton crop. Judge Hough, in December, 1918, in U. S. v. Lynch, not reported, construed the section as including a civilian probationer in the War Department who was still on probation and being tested as to his fitness for a commission in the army. In Re Yee Gee, 83 Fed. R. 145, an interpreter appointed by the Secretary of the Treasury was held not to be within the statute, but for the reason that only the Court had any power to appoint interpreters, and that therefore
118 he was not acting under the authority of a department or office of the Government. In Sharp v. U. S., 138 Fed. R. 878, an Indian agent appointed by the Commissioner of Indian Affairs was held to be within the statute. These are the only cases which I have found having any important bearing upon the section and none of them presents a very direct analogy to the facts at bar. So far as they go they all look to a broad construction of the language of the section.

In principle it seems to me that this case is within the law. The Director General of Railways is an office or department of the Government charged with the operation of the railways of the United States and Zwillinger was acting under his authority. It is of course true that he was appointed and discharged by subordinates who were in turn not appointed by an "officer" of the United States as defined in U. S. v. Germaine, supra. Nevertheless, although at several removes, he was acting under the authority of the Director General. Moreover, in caring for and dispatching baggage entrusted to the railroad he was acting on behalf of the United States, since the dispatch of baggage was a duty which the United States had assumed and which only baggage porters could discharge. So the sole question is whether he was acting in an "official function."

It must be conceded that the section would as well cover the case if the words "official function" were omitted, and that it is something of a strain upon the ordinary use of language to speak of a baggage porter's duties as "official." Yet the business of operating a railway is nothing more than that of moving persons and
119 things from one place to another and a baggage porter actually performs a part of that movement. It is quite impossible to establish any consistent line, based upon the importance of his duties, which will make them any the less "official." No-

body, I should think, would say that a traffic manager had no official functions, or indeed a freight dispatcher, or a ticket seller. At least about them I can see no plausible doubt. With deference there seems to me no basis for the limitation thrown out obiter by Judge McPherson in U. S. v. Ingham, supra. No doubt we ought not to press logic to its conclusions, for we are only dealing with common words, but we ought to execute the purposes which the words contain.

If we look at the purpose of the section, there seems to me every reason not to draw any line based upon the supposed inaptitude of the words "official function." The section is full of verbiage, no doubt, but its very presence shows a desire for comprehension. The draughtsmen certainly wished to include all efforts by corruption to impede the success of the United States in any of its enterprises. All such enterprises are official as soon as the United States lawfully undertakes them, and any interference with them by debauching those on whom any part of their execution is imposed, is a prejudice to the United States whether the impediment be grave or trivial. This result is the evil against which the statute is clearly aimed and it seems to me covered by the use of a phrase like "official function" without undue violence to common use. Indeed, if the importance of the duty delegated be a test the custody and correct dispatch of valuable baggage is certainly not a trivial function.

120 I think the point is not well taken and the motion is denied.

April 7, 1919.

L. H., *D. J.*

Order of Settlement and Allowance.

Foregoing bill of exceptions is hereby settled and allowed and ordered filed.

Dated N. Y., October 10, 1919.

LEARNED HAND,
U. S. D. J.

The entry of the above order is hereby consented to.

FRANCIS G. CAFFEY,
U. S. Attorney.

121 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Defendant-in-Error,
vs.
HARRY KRICHMAN, Plaintiff-in-Error.

On Indictment.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated October 15, 1919.

FRANCIS G. CAFFEY,
Attorney for Defendant-in-Error.

EDWARD SCHOEN,
Attorney for Henry Krichman,
Plaintiff-in-Error.

122 UNITED STATES OF AMERICA,
Southern District of New York, ss:

UNITED STATES OF AMERICA, Defendant-in-Error,
vs.
HARRY KRICHMAN, Plaintiff-in-Error.

On Indictment.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 15th day of October, in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the said United States the one hundred and forty-fourth.

[L. S.] ALEX. GILCHRIST, JR.,
Clerk.

123 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, Defendant-in-Error,
against
HARRY KRICHMAN, Plaintiff-in-Error.

Before Ward, Rogers, and Hough, Circuit Judges.

Francis G. Caffey, United States Attorney, Attorney for Defendant-in-Error.

David V. Cahill, Assistant United States Attorney, of Counsel.
Edward Schoen, Attorney for Plaintiff-in-Error.

This cause comes here on writ of error to the United States District Court for the Southern District of New York.

ROGERS, *Circuit Judge:*

The defendant has been convicted under an indictment which originally contained four counts. The first count charges that he unlawfully, wilfully, corruptly and knowingly did promise and offer money to Herman Zwillinger who was then and there a
124 person acting for and on behalf of the United States in an official function under and by authority of the office of the Director General of Railroads of the Government thereof, to wit a baggage porter employed on and by the Pennsylvania Railroad Company, a common carrier which was then and there operated by the Director General of Railroads of the United States. That the promise and offer were made with the intent to induce Zwillinger to give and deliver to defendant in the City of New York certain trunks designated by defendant, and which would come into the possession of the railroad as baggage to be transported from the State of New York to other States, and which it would be the duty of Zwillinger to cause to be transported and to aid in transporting.

The second count charges that defendant offered to Zwillinger, a person acting for and on behalf of the United States in an official function under and by authority of the office of the Director General of Railroads, to wit a baggage porter employed on the Pennsylvania Railroad the sum of $50.00. That the offer was made to induce Zwillinger to violate his duty as such baggage porter and to deliver to defendant a certain trunk containing furs which was then in the possession of the railroad company as baggage and was in
125 course of transportation from the State of New York to the State of Pennsylvania.

The third count charges that defendant gave Zwillinger $45.00 with intent to induce him to deliver to defendant a trunk containing furs which was in the possession of the railroad as baggage, and in course of transportation as already stated, and which trunk was not the property of either the defendant or of Zwillinger.

The fourth count was dismissed by the court, and the case went to the jury on the first three counts.

The indictment was brought under section 39 of the Criminal Code, U. S. Compiled Statutes (1916) vol. 10, p. 12610. The provision may be found in the margin.[1]

[1] "Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or in behalf of the United States in any official function, under or by authority of any department or office of

126 The testimony in effect was as follows:

The baggage porter named in the indictment was employed in that capacity by the Pennsylvania Railroad at its station in the Borough of Manhattan, New York City. The defendant was in the fur business. In November, 1918, he visited the Pennsylvania Station on several occasions and there had conversations with the baggage porter. On the first occasion the defendant inquired about the handling of trunks that passed through the hands of the porter at the station and suggested that there were opportunities for the porter to make some money. The porter inquired how this could be done. The defendant explained that he would be willing to give the porter money for turning over to him trunks belonging to other people. The porter indicated willingness to consider the proposition and promptly reported the matter to his superiors. About two weeks later the defendant saw the porter at the station concerning a particular trunk, which it turned out had already passed beyond the control of the porter. On the night of that visit, the defendant telephoned the porter that another described trunk would arrive at the station the next day. On the following day the defendant appeared at the station and paid the porter $45.00 for delivering the trunk to him. The trunk was placed on a wagon, which was driven away from the Pennsylvania Station on the way to the Grand Central Station. Before the arrival at the Grand Central Station, the defendant got on the wagon and was then arrested by a railroad police officer. The trunk contained furs.

There are two questions raised in connection with this case. (1) Does the indictment on its face sufficiently allege the commission of the crime named in the section of the Criminal Code upon which the indictment rests? In other words is a baggage porter employed as such on the Pennsylvania Railroad Company and discharging his duties in that capacity, while that common carrier is operated
127 by the Director General of Railroads of the United States, a person acting for and on behalf of the United States in an official function? (2) Assuming that the above question is

---

the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or permit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, prom-sed, given, made, or tendered, and imprisoned not more than three years."

answered in the affirmative does the proof show that the baggage porter was a person acting for and on behalf of the United States in an official function, it not having been proved that at the time named the Pennsylvania Railroad was being operated by the Director General of Railroads.

As respects the first of these questions it is claimed that the indictment does not charge an offense inasmuch as the baggage porter described therein is not a person acting for and on behalf of the United States in an official capacity. We think the question thus presented must be answered in the affirmative.

In United States v. Birdsall 233 U. S. 223, 230 the court had to pass upon the meaning of Section 39 of the Criminal Code, and it declared that "Every action that is within the range of official duty" comes within the purview of the section. The court went on to say that "To constitute it official action, it was not necessary that it should be prescribed by Statute; it was sufficient that it was governed by a lawful requirement of the department under whose authority the officer was acting." As we read the opinion in that case
128 the court held it to be within the competency of the Department of the Interior to establish regulations and practices having the force of regulations, that all persons "employed in its work" should render to the Commissioner whenever required true reports and give disinterested and honest advice with respect to the performance of any duty devolving upon the Commissioner and that the giving and acceptance of bribes to influence the employees of the Department in their action in such matters is within the section of the Criminal Code under which the indictment in that case as in this was laid. In that case the duty that was to be performed did not arise under any Act of Congress but was based on an established custom or practice of the Bureau of Indian Affairs to recommend to the executive or the judicial departments of the Government as to whether clemency should be extended to or withheld from any person charged with or convicted of selling intoxicating liquors to Indians. The accused persons were special agents or officers appointed by the Commissioner of Indian Affairs, under the authority of the Secretary of the Interior, for the suppression of the liquor traffic among the Indians. The bribe was given to influence their report to the Commissioner of Indian Affairs as to
129 whether that official should favor or oppose clemency in a particular case.

In Haas v. Henkel 216 U. S. 462 one Holmes was indicted with Haas and another charged with conspiracy to commit an offence against the United States which was to be accomplished by bribing Holmes to do certain acts in violation of his lawful duty not to give out advance information in respect to the condition of the cotton crop acquired in the performance of his official duty as an employee in the Department of Agriculture. He was an assistant statistician, and the indictment averred that he "was an employee or an official in said Department (of Agriculture) and in the Bureau of Statistics." The indictments set forth that one of the governmental func-

tions exercised by that department is the acquirement of detailed information in respect to the condition of the cotton crop. That under the custom, practices and regulations of the Secretary all officers and employees are required to keep secret the information so gathered, and from in any way divulging same or giving out any information forecasting such report in advance of its official approval and promulgation. The indictments were held to be sufficient. Can it be that it was a criminal offense against the United States to bribe the assistant statistician to disclose the information, but not an offense against the United States to bribe a stenographer in the office to do the same thing? Are not both acting on behalf
130 of the United States in an official function while employed in the Department? If such a person is not within Section 39 we can only say what the Supreme Court said in United States v. Hartwell, 6 Wall. 385, 395: "If the subordinates are not within the act, there is no provision in the laws of the United States for their punishment in such cases. * * * We think it clear that it was not the intention of Congress to leave an omission so wide and important in the Act * * *." In that case the indictment alleged that the defendant, was an officer of the United States, to wit a clerk in the office of the assistant treasurer of the United States at Boston. The court held the indictment sufficient and that defendant was a public officer. It said "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe." This case has frequently been cited with approval in subsequent
131 cases which may be found in the margin.[1]

In United States v. McCrory 91 Fed. 295 the Circuit Court of Appeals in the Fifth Circuit held that letter carriers in the postal service are officers of the United States within the meaning of the Act of Congress there construed.

In United States v. Ingham 97 Fed. 935, Judge McPherson, then a District Judge, passing upon Section 39 of the Criminal Code herein involved held that it must be construed as including persons not officers, and that a secret service operative employed by the Secretary of the Treasury to aid in the detection and suppression of frauds against the revenue laws was acting, while in the performance of such service, on behalf of the United States in an official function and that his attempted bribery is an offense within the terms of the Statute. It was pointed out in that case that the phrase

---

[1]United States v. Germaine 99 U. S. 508; Hall v. Wisconsin 103 U. S. 5, 8; United States v. Perkins, 116 U. S. 483; United States v. Monat 124 U. S. 303; United States v. Smith 124 U. S. 525; Auffmordt v. Hedden 137 U. S. 310.

"official function" is not necessarily a function belonging to an office held by the person acting on behalf of the United States, but that it may also be a function belonging to an office held by his superior, which function has been committed to the subordinate (whether he be also an officer, or a mere employee) for the
132 purpose of being executed.

In McGregor v. United States 134 Fed. 187 the Circuit Court of Appeals in the Fourth Circuit held that a third class clerk in the Post Office Department is an officer of the Government within the meaning of the legislation of Congress therein involved.

But in the case at bar in order to sustain the indictment under which the defendant has been convicted it is not necessary to hold and we do not hold that the defendant at the time the offence charged was committed was an officer of the United States. We do not think he was. But we do hold that he was acting on behalf of the United States in an official function, a function belonging to his superior the Director General of Railroads and committed to him for the purpose of being executed.

Any employee in any department of the Government of the United States who acts in the performance of a duty which is imposed upon that department, or aids in any way in the performance of such a duty, is acting on behalf of the United States in an official function and within the range of official duty, within the meaning of Section 39 of the Criminal Code. The words of the Section are not to be narrowed to the exclusion of what the legislature intended to embrace. That intention is not to be de-
133 feated by an over-strict construction. The rule that a penal law is to be construed strictly "comes attended," said the court in United States v. Hartwell, supra, "with qualifications and other rules no less important. * * * The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended."

The Act of Congress of August 29th, 1916, (39 Stat. 645) gave the President power "in time of war" to take possession and assume control of any system or systems of transportation within the boundaries of the continental United States. In April, 1917, war with Germany was declared. On December 26, 1917, the President issued his proclamation in which he declared that he took possession and assumed control at 12 o'clock noon on December 28, 1917, of each and every system of transportation within the boundaries of the continental United States and consisting of railroads engaged in general transportation, including terminals and all other equipment and appurtenances commonly used upon or operated as a part of such rail system of transportation. By the proclamation a Director General of Railroads was appointed with full authority to take possession and control of the systems embraced by the proclama-
134 tion, and to operate and administer the same. And the Director General was empowered to avail himself of the services of the existing officials, boards of directors, receivers, employees, etc., who were authorized to continue to perform their duties in accord-

ance with their previous authority until and except so far as such Director shall from time to time otherwise provide by general or special orders. The railroads by virtue of this proclamation passed into the possession, control and operation of the Director General on December 28, 1917, as held by the Supreme Court in Northern Pacific Ry. Co. v. North Dakota, decided on June 2, 1919, and not yet reported. The railroads thus taken possession of by the government of the United States have not yet been returned to private ownership, and so at the time named in the indictment the Director General was in control of the railroads of the United States which are within the terms of the proclamation referred to and in operating them was in the performance of an official duty. Therefore all persons assisting him in the operation of the roads, whether officers or mere employees, including the men who handled the baggage, were in so doing persons acting for and on behalf of the United States in an official function.

This brings us to the second question involved. It seems that no evidence was offered to establish the fact that the Pennsyl-
135 vania Railroad was being operated in November, 1918, by the Director General of Railroads. The United States Attorney contends that it was not necessary to prove that fact as the courts take judicial notice of Presidential Proclamations and of the Acts of Congress. The objection made by the defense is without merit, and this court in what it has said about the President's Proclamation has taken judicial notice of the Proclamation of the President of December 26, 1917, and that the railroads of the continental United States, including of course the Pennsylvania, passed into the control of the Director General of Railroads on December 28, 1917, as also appears from the decision of the Supreme Court in Northern Pacific Ry. Co. v. North Dakota, supra. The proclamation referred to is a public Act of which all courts of the United States are bound to take notice and to which all courts are bound to give effect. Armstrong v. United States 13 Wall. 154.

The claim that the railroads were taken over in pursuance of contracts made by the Director General of Railroads with the carriers is not borne out by the facts. The contracts were merely agreements for compensation made under the Federal Control Act of March 21, 1918, (40 Stat. 451). The preamble to that Act states: "That the President, having in time of war taken over the possession, use, con-
trol and operation (called herein Federal control) of certain
136 railroads," etc.

To show that the baggage porter in this case was an employee of the United States it was only necessary for it to appear that he was employed as a baggage porter in the baggage room of the Pennsylvania Railroad at its station in New York, and was serving in that capacity at the time referred to in the indictment. This proof was made.

The indictment being valid and the proof sufficient

Judgment is affirmed.

137 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States of America, Defendant-in-Error, against Harry Krichman, Plaintiff-in-Error. (Copy.) Opinion. Rogers, Circuit Judge.

138 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, Defendant-in-Error (Plaintiff below)

against

HARRY KRICHMAN, Plaintiff-in-Error (Defendant below).

Before Ward, Rogers and Hough, Circuit Judges.

WARD, *Circuit Judge* (dissenting):

The Court in its opinion admits that the defendant, a baggage porter of the Pennsylvania Railroad Company operated by the Director General of Railroads, is not an officer of the United States, so that the only words in the statute that can cover him are, "or to any person acting for or in behalf of the United States in any official function under or by authority of any department or office of the government thereof." Some meaning must be given to the words "in any official function." They seem to me to be words of limitation so that the statute covers not all duties but duties of a kind similar to those of the high functionaries enumerated in it. There must be some employees of the United States who do not act in an official function. Who are they?

139 The construction adopted by the Court gives these words no meaning. They might as well or indeed better have been omitted, because window cleaners, scrub women, elevator boys, doorkeepers, pages,—in short, anyone employed by the United States to do anything is included. Such persons in my opinion are not acting for the United States in an official function.

I think the judgment should be reversed.

139½ [Endorsed:] United States Circuit Court of Appeals, Second Circuit. The United States against Harry Krichman. (Copy.) Dissenting Opinion. Ward, Circuit Judge.

140 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 24th Day of January, One Thousand Nine Hundred and Twenty.

Present:

Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Circuit Judges.

HARRY KRICHMAN, Plaintiff in Error,

v.

UNITED STATES, Defendant in Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R.

C. M. H.

141 Endorsed: United States Circuit Court of Appeals, Second Circuit. Harry Krichman v. U. S. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 26, 1920. William Parkin, Clerk.

142 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 141 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Harry Krichman against United States as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of February in the year of our Lord One Thousand Nine Hundred and Twenty and of the Independence of the said United States the One hundred and Forty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

143 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Harry Krichman is plaintiff in error, and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the
144 record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of March, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

145 [Endorsed:] File No. 27,501. Supreme Court of the United States, No. 746, October Term, 1919. Henry Krichman vs. The United States of America. Writ of Certiorari.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Mar. 16, 1920. William Parkin, Clerk.

Copy.

146 United States Supreme Court.

HARRY KRICHMAN, Plaintiff-in-Error,

vs.

UNITED STATES OF AMERICA, Defendant-in-Error.

On Writ of Certiorari.

Stipulation.

The Supreme Court of the United States having heretofore on March 8th, A. D., 1920 granted a Writ of Certiorari in this cause, it is on this fifteenth day of March, A. D., 1920, stipulated and agreed by and between Alex. C. King, of counsel for the Government, and

Edward Schoen, of counsel for the plaintiff-in-error, that the certified transcript of the record on file in the office of the Clerk of the Supreme Court of the United States, be taken as a return to the writ.

(S.) ALEX C. KING,
Solicitor-General.
(S.) HARRISON P. LINDABURY,
(S.) EDWARD SCHOEN,
Of Counsel for Plaintiff in Error.

Dated March 15, 1920.

147 [Endorsed:] United States Supreme Court. Harry Krichman, plaintiff-in-error, vs. United States of America, defendant-in-error. On Writ of Certiorari. Stipulation. Edward Schoen, of counsel for plt'ff in error, 207 Market St., Newark, N. J.

148 To the Honorable the Supreme Court of the United States. Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of said court, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein. Dated, New York, March 22nd, 1920.

WM. PARKER,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

149 [Endorsed:] 746/27501. United States Circuit Court of Appeals, Second Circuit. Harry Krichman v. U. S. Return to certiorari.

150 [Endorsed:] File No. 27,501. Supreme Court U. S. October Term, 1919. Term No. 746. Henry Krichman, Petitioner, vs. The United States of America. Writ of certiorari and return. Filed March 27, 1920.

151 In the Supreme Court of the United States.

No. 746.

HARRY KRICHMAN, Petitioner,

v.

UNITED STATES, Respondent.

Stipulation as to the Printing of the Record.

It is stipulated that in printing the record in the above entitled cause in the Supreme Court of the United States, the testimony in said transcript need not be printed, but that the following parts of said transcript shall be printed as being that designated by the parties to be necessary for the consideration of said case, to-wit: Docket

entries, page 1; Petition for Writ of Error, pages 2 and 3; Writ of Error, pages 4 and 5 (Fol. 14); Citation, pages 5 and 6, (Fols. 15, 16, & 17); Assignments of Error, page 7; Order to file Amended Assignments of Error, pages 8 and 9; Order and Consent extending time to file record, pages 10 and 11; Order extending time to file record, page 12; Indictment, page 13; Stipulation, page 113; Opinion on Motion in Arrest of Judgment, pages 115, 116, 117, 118 and 119; Order of Settlement and Allowance, page 120; Stipulation, page 121; Certificate, page 122; Majority and dissenting Opinions of the Circuit Court of Appeals; Petition for Writ of Certiorari and Writ of Certiorari and Return.

It is further stipulated that if hereafter either party hereto shall deem any part of said transcript other than the above, to be material to be considered by said Supreme Court, said party may cause such part of said transcript to be printed, and such additional part
152 shall be taken as a part of the record material to be considered by said court. Notice of such purpose to print, describing the additional part of said record to be printed, shall be given to the opposite party or his counsel, at least ten days before said cause is argued or submitted.

HARRISON P. LINDABURY,
EDWARD SCHOEN,
Counsel for Petitioner.
ALEX. C. KING,
Solicitor General.

April 8, 1920.

153 [Endorsed:] 746/27501. In the Supreme Court of the United States. Harry Krichman, Petitioner, v. United States, Respondent. No. 746. Edward Schoen, Counsel for Petitioner, 207 Market St., Newark, N. J.

154 [Endorsed:] File No. 27,501. Supreme Court U. S. October Term, 1919. Term No. 746. Harry Krichman, Petitioner, vs. The United States. Stipulation as to printing record. Filed April 13, 1920.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 260.

HARRY KRICHMAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

BRIEF OF PETITIONER.

EDWARD SCHOEN,
Counsel for Petitioner.

(27.501)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 260.

HARRY KRICHMAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI.

BRIEF OF PETITIONER.

Statement of the Case.

The defendant was convicted of bribery under section 39 of the Criminal Code, United States Compiled Statutes (1916), volume 10, page 12610. This provision of the statute makes it a crime to promise, offer or give money or any other thing of value to:

(*a*) Any officer of the United States, or to any person acting for or in behalf of the United States in any official function.

(*b*) Any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof.

The indictment in this case alleges that the petitioner offered a bribe to one Zwillinger, *a baggage porter employed on and by the Pennsylvania Railroad Company, a common carrier.*

Questions Involved.

The precise question raised is whether a baggage porter employed on and by the Pennsylvania Railroad Company is a person acting for and on behalf of the United States in an *official function.* If he is not, no crime was committed by the petitioner. The question raised goes to the very essence of the charge, and if it be good, the defendant has been illegally convicted.

Specification of Errors Relied Upon.

1. The denial of the motion in arrest of judgment by the trial judge.

2. The determination of the United States Circuit Court of Appeals for the Second Circuit that there was no error in the action of the trial

judge in denying the motion made in arrest of judgment.

ARGUMENT.

Section 39 of the Compiled Statutes, upon which the indictment rests, was passed by Congress long before the Government undertook the operation of the railroads of the country. Hence at the time of the enactment of the statute railroad employees did not come within the scope of the act.

The question then arises, Has the war-time proclamation of the President, directing that certain railroad systems be taken over by the Government for war purposes, created the status of master and servant between the Government and the railroad employees, so as to bring Zwillinger, a baggage porter, within the class defined by the statute? Congress has settled this question.

All doubt as to the intent of Congress to withhold recognition of the employees of such railroads, as Government employees, is entirely removed by the clear and positive declaration in the following act, Title XIX, "Several Classes of Officers and Employees," Chapter A, 3270-A, United States Compiled Statutes (1919 Supplement):

> "The provisions of this section shall not apply to employees of the railroad, express companies, telegraph, telephone, marine cable or radio system or systems taken over by the United States, and nothing contained

> herein shall be deemed a recognition of the employees of such railroads, express companies, telegraph, telephone, marine cable or radio system or systems, as employees of the United States."

This provision would seem to remove all doubt as to the status of the baggage porter, to whom the bribe is alleged to have been offered. Clearly, under this provision of the statutes, Congress has, in so many words, said that it does not recognize him even as an employee of the United States. The defendant therefore has not violated section 39 of the Criminal Code of the United States, and his conviction is illegal.

Assuming that this Honorable Court shall conclude that the baggage porter in question was an employee of the United States Government at the time the bribe was offered, another question still remains, viz: *Is a baggage porter a person acting for and on behalf of the United States in an official function?* Justice Ward discussed this question in the dissenting opinion filed in this cause in the United States Court of Appeals in the following language (Case, p. 22):

> "The court in its opinion admits that the defendant, a baggage porter of the Pennsylvania Railroad Company, operated by the Director General of Railroads, is not an officer of the United States, so that the only words in the statute that can cover him are 'or to any person acting for or in

behalf of the United States in any official function under or by authority of any department or office of the Government thereof.' Some meaning must be given to the words 'in any official function.' They seem to me to be words of limitation, so that the statute covers not all duties but duties of a kind similar to those of the high functionaries enumerated in it. There must be some employees of the United States who do not act in an official function. Who are they?

"The construction adopted by the court gives these words no meaning. They might as well or, indeed, better, have been omitted. Because window cleaners, scrub women, elevator boys, doorkeepers, pages—in short, anyone employed by the United States to do anything is included. Such persons in my opinion are not acting for the United States in an official function.

"I think the judgment should be reversed."

For these reasons it is respectfully submitted that the verdict and judgment in this cause should be reversed.

Respectfully submitted,

EDWARD SCHOEN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 260.

HARRY KRICHMAN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF OF PETITIONER.

EDWARD SCHOEN,
Counsel for Petitioner.

(27,501)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 260.

HARRY KRICHMAN, PETITIONER,

vs.

UNITED STATES OF AMERICA, DEFENDANT.

SUPPLEMENTAL BRIEF OF PETITIONER.

Supplemental Argument.

Under the statutes of the United States, persons acting for or on behalf of the United States in an official function can only do so when regularly appointed, viz.,

(1) By commission, or

(2) By appointment under Civil Service regulation.

Sec. 3216, N. S., C. S., sec. 1767, Revised Statutes.

No proof appears that the baggage porter in question was acting by virtue of either of these methods of appointment.

His Honor Judge Learned Hand, the trial judge, in his opinion, while apparently writing with a firm conviction, in fact did so with grave doubt about the soundness of his view. After citing the authorities upon which he based his conclusions, he admits (Case, p. 13):

> "These are the only cases which I have found having any important bearing upon the section, and *none of them presents a very direct analogy to the facts at bar.*"

Again (Case, p. 13):

> "It must be conceded that the section would as well cover the case if the words 'official function' were omitted, and that *it is something of a strain* upon the ordinary use of language to speak of a baggage porter's duties as 'official.'"

And, further (Case, p. 14):

> "It seems to me covered by the use of a phrase like 'official function,' *without undue violence to common use.*"

These extracts from the opinion clearly indicate a serious doubt in the mind of the trial judge upon the question at issue.

First, he admits that none of the cases cited present a very direct analogy to the facts at bar; also that it is something of a *strain* upon the ordinary use of language to speak of a baggage porter's duties as "official;" also that the construction contended for by the Government may be adopted without *undue violence to common language.*

A construction of statutory language which requires a *"strain"* upon the ordinary use of language and some "violence to common use," even though it be not "undue violence," should be discarded in the construction of a criminal and penal statute.

Upon the oral argument before this honorable court, the attention of counsel was directed to the case of United States *vs.* Strange *et al.*, decided January 3, 1921. That case turned on the construction of section 41 of the Criminal Code, prohibiting any member of a firm from acting as officer or agent of the United States for the transaction of business for such firm. In this case this honorable court construed the word "agent" as used in the statute and defined its limitations. The case appears to be quite analogous to the case at bar. In fact, the situation presented a clearer and stronger case for the Government than the case at bar.

It is respectfully submitted that United States *vs.* Strang et al. is dispositive of the issue raised in this case.

The Government in its brief admits that the statute is *ambiguous.* The trial judge was doubtful about it. The Court of Appeals was divided in its decision. The Government in its brief asks for a liberal construction of the statute and practically admits that under a strict construction the defendant is not within its terms. In this situation, two well-established principles of law are applicable to the case and, with due deference, it is urged should control the decision:

1. Penal statutes should be construed strictly.

2. If there is a reasonable doubt on law or fact, the defendant is entitled to the benefit of it.

Further, the established principle in statutory construc-

tion, that where general words follow specific words the general words relate to the class specifically described.

In the comparison of section 39, Criminal Code, and section 6 of the act of February 6, 1853, set out in the brief of the Government, it is significant to note that the broadest words, viz., "or person holding any place of trust or profit," were omitted from section 39. It is a fair inference, therefore, that it was the intent of Congress to limit the application of this statute to higher functionaries specifically enumerated in the statute.

If the defendant in this case gave money to a baggage porter to obtain something which did not belong to him, he is a principal in the commission of a larceny. No special statute relating to bribery is necessary to reach him.

A considerable portion of the brief of the Government is devoted to the contention that words expressly omitted from section 39, when it was recast from the act of 1853, should again be read into it, and that in the construction of section 39 it should receive a liberal construction (Government Brief, page 20). On behalf of the petitioner, however, it is respectfully urged that the statute under consideration is a penal statute and should be strictly construed, and if the indictment cannot be sustained without reading something into the statute which is not there and without a liberal construction of a penal statute, then the conviction in this case should be reversed.

The examples given by Judge Ward of the results of a liberal construction of this statute and the examples in the Government brief (Government Brief, page 20), such as a janitor or charwoman who, for a bribe, admitted a thief, do present valid objection to the construction sought by the

Government. In the case of the janitor or charwoman who, for a bribe, admitted a thief, they are principals in a larceny, and no bribery statute is necessary.

For these additional reasons, and especially upon the authority of United States *vs.* Strang et al., the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

EDWARD SCHOEN,
Of Counsel with Petitioner.

FILED

FEB 29

JAMES D. MAHER

No 7[redacted]260

Supreme Court of the United States

March Term, 1920.

UNITED STATES OF AMERICA,
Respondent,

vs.

HARRY KRICHMAN,
Petitioner.

PETITION FOR WRIT OF CERTIORARI AND BRIEF ON PETITION.

EDWARD SCHOEN,
Attorney for Petitioner.

HARRISON P. LINDABURY,
Of Counsel.

Arthur W. Brown, Law Printer, [redacted] Newark, N. J.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Respondent,

against

HARRY KRICHMAN,
Petitioner.

To Francis G. Caffey, United States Attorney,
Attorney for Respondent.

Sir:

TAKE NOTICE that on Monday, the first day of March, A. D. 1920, I shall submit the petition, a copy of which is herewith served upon you, to the United States Supreme Court for a writ of certiorari to review the decision of the Circuit Court of Appeals made in the above entitled cause.

Dated February 17th, A. D. 1920.

Respectfully yours,

EDWARD SCHOEN,
Attorney.

HARRISON P. LINDABURY,
Of Counsel.

Service of a copy of within notice and petition is hereby acknowledged this 18th day of February, A. D. 1920, two weeks' notice being waived.

FRANCIS G. CAFFEY,
U. S. Attorney,
per D. L.

PETITION FOR WRIT OF CERTIORARI.

IN THE SUPREME COURT OF THE UNITED STATES.

To the Honorable the Supreme Court of the United States:

The petition of Harry Krichman respectfully shows to the Court as follows:

Harry Krichman was indicted and convicted for bribery of a United States official under Sec. 39, U. S. C. C. The action was brought in the District Court of the United States of America, for the Southern district of New York. The case was taken by writ of error to the Circuit Court of Appeals for the Second Circuit, which Court, on January 14, 1920, affirmed the judgment and remanded the record to the Court below. The mandate went down on the 27th day of January, A. D. 1920.

Your petitioner is advised that the Circuit Court of Appeals was in error in affirming the judgment, but should have reversed the said judgment.

The indictment alleges:

> "That Harry Krichman did unlawfully, &c., * * * promise and offer money * * * to Herman Zwillinger, who was then and there a person acting for and on behalf of the United States in an official function * * * to wit, a baggage porter employed on and by the Pennsylvania Railroad Company * * *"

The indictment was brought under Section 39 of the Criminal Code (U. S. Compiled Statutes, 1916), vol. 10, p. 12610, which is as follows:

> "Whoever shall promise, offer or give or accept or procure to be promised, offered or given, any money or other thing of value * * * to any officer of the United States, or to any person acting for or in behalf of the United States in any official function, * * * with intent to influence his decision or action on any question, matter, cause or proceeding, which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit * * * shall be imprisoned, &c., * * *"

Two questions are raised in connection with this case:

> (1) Does the indictment, on its face, sufficiently allege the commission of the crime named in the section of the Criminal Code upon which the indictment rests? In other words, is a baggage porter, employed as such on the Pennsylvania Railroad, a person acting for and on behalf of the United States, in an official function?
>
> (2) Assuming that the above question is answered in the affirmative, does the proof show that the baggage porter was a person acting for and on behalf of the United States in an official function, it not having been proved that at the time named the Pennsylvania Railroad Company was being operated by the Director-General of Railroads?

As respects the first of these questions, it is urged that the indictment does not charge an offense, inasmuch as the baggage porter de-

scribed therein is not a person acting for and on behalf of the United States in an official capacity.

This precise question has never been passed upon in this court, and your petitioner is advised that the thirty-ninth section of the Compiled Statutes, upon which the indictment against him rests, does not apply to a baggage porter, employed by the Pennsylvania Railroad Company, and that therefore no crime against the United States Government was committed.

In support of this, your petitioner respectfully shows that the decision of the United States Circuit Court of Appeals, affirming the judgment against him, was not unanimous, but that on the contrary, Chief Justice Ward, of the Circuit Court of Appeals for the Second District, before whom this case was argued, filed a dissenting opinion, sustaining the contention of your petitioner, to which your petitioner begs leave to refer.

Your petitioner further respectfully shows that he is further supported in the contention that a baggage porter employed by the Pennsylvania Railroad Company is not a person acting for the United States in an official function, by Title XIX, *"Several Classes of Officers and Employees,"* Chapter A, Section 3270-A, United States Compiled Statutes (1919 Supplement), as follows:

> "The provisions of this section shall not apply to employees of the railroads, express companies, telegraph, telephone, marine cable or radio system or systems, taken

> over by the United States, and nothing contained herein shall be deemed a recognition of the employees of such railroads, express companies, telegraph, telephone, marine cable or radio system or systems as employees of the United States."

Your petitioner presents herewith, as part of this petition, a transcript of the record in the Circuit Court of Appeals.

Your petitioner respectfully prays that inasmuch as the judgment of affirmance in the Circuit Court of Appeals, was by a divided court, and in view of the provision of the Compiled Statutes, hereinabove set forth, by which Congress clearly withholds recognition of the employees of the railroads as employees of the United States, that a writ of certiorari be issued out of and under the seal of this court directed to the Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this case which was entitled in that court to the end that said case may be reviewed and determined by this court as provided by law, and that your petitioner may have such further relief or remedy in the premises as to this court may seen appropriate, and that the said judgment of the said Circuit Court of Appeals may be reversed by this honorable court.

Your petitioner further shows that inasmuch as the facts are all before the court, justice can

be done, and delay and expense can be saved by entering an order, modifying the judgment of the Circuit Court of Appeals, by eliminating the direction to enter judgment of affirmance, and substituting a judgment of reversal.

It is submitted that Section 3270-A, United States Compiled Statutes (1919 Supplement), *supra*, together with Section Thirty-nine of the Criminal Code (*supra*), upon which the indictment rests, are dispositive, and that there is, therefore, sufficient before this court to enable it to make the order prayed for without a writ of certiorari, and sending up the order in obedience thereto.

Wherefore your petitioner prays, in the alternative, that an order be issued out of and under the seal of this court, directing that the action of the Circuit Court of Appeals be modified by eliminating the direction to enter a judgment of affirmance, and by substituting a judgment of reversal.

HARRY KRICHMAN,
Petitioner.

HARRISON P. LINDABURY,
Counsel for Petitioner.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss.

HARRY KRICHMAN, being duly sworn according to law, on his oath deposes and says:

That he is the petitioner named in the foregoing petition, and that he prepared the foregoing petition and that the allegations therein are true to his own knowledge and belief except insofar as it refers to the transcript of the case and the decision of the court, as to which matters his knowledge and information is received from the printed transcript of the case and from information given to him by the attorneys of said petitioner.

HARRY KRICHMAN.

Sworn and subscribed to before
me this 18th day of February, A. D. 1920.

PHILIP KLEIN,
Attorney at Law of New Jersey.

CERTIFICATE OF COUNSEL.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the cause is one in which the prayer of the petitioner should be granted by this court.

HARRISON P. LINDABURY,
Of Counsel with Petitioner.

UNITED STATES SUPREME COURT.

UNITED STATES OF AMERICA, *Respondent,* *vs.* HARRY KRICHMAN, *Petitioner.*	*Brief of Petitioner.*

The defendant was convicted of bribery under Section 39 of the Criminal Code, United States Compiled Statutes (1916), vol. 10, p. 12610. This provision of the statutes makes it a crime to promise, offer or give money or any other thing of value to:

(a) Any officer of the United States, or to any person acting for or in behalf of the United States in any official function.

(b) Any officer or person acting for or on behalf of either House of Congress, or of any Committee of either House, or both Houses thereof.

The indictment in this case alleges that the petitioner offered a bribe to one Zwillinger, *a baggage porter employed on and by the Pennsylvania Railroad Company, a common carrier.*

The precise question raised is whether a baggage porter employed on and by the Pennsylvania Railroad Company is a person acting for and on behalf of the United States in an official function. If he is not, no crime was committed by the petitioner. The question raised goes to

the very essence of the charge, and if it be good, the defendant has been illegally convicted.

Section 39 of the Compiled Statutes, upon which the indictment rests, was passed by Congress long before the government undertook the operation of the railroads of the country. Hence, at the time of the enactment of the statute, railroad employees did not come within the scope of the act.

The question then arises, has the war-time proclamation of the President, directing that certain railroad systems be taken over by the government for war purposes, created the status of master and servant between the government and the railroad employees? Congress has settled this question.

All doubt as to the intent of Congress to withhold recognition of the employees of such railroads, as government employees, is entirely removed by the clear and positive declaration in the following act, Title XIX, "Several Classes of Officers and Employees," Chapter A, 3270-A, United States Compiled Statutes (1919 Supplement):

> "The provisions of this section shall not apply to employees of the railroad, express companies, telegraph, telephone, marine cable or radio system or systems, taken over by the United States, and nothing contained herein shall be deemed a recognition of the employees of such railroads, express companies, telegraph, telephone, marine cable or radio system or systems, as employees of the United States."

This provision would seem to remove all doubt as to the status of the baggage porter, to whom the bribe is alleged to have been offered. Clearly, under this provision of the statutes, Congress has, in so many words, said that it does not recognize him as an employee of the United States. Your petitioner therefore has not violated Section 39 of the Criminal Code of the United States, and his conviction is illegal.

Assuming that this honorable court shall conclude that the baggage porter in question was an employee of the United States Government at the time the bribe was offered, another question still remains, viz.: *Is a baggage porter a person acting for and on behalf of the United States in an official function?* Justice Ward discussed this question in the dissenting opinion filed in this cause in the United States Court of Appeals in the following language:

> "The Court in its opinion admits that the defendant, a baggage porter of the Pennsylvania Railroad Company, operated by the Director-General of Railroads, is not an officer of the United States, so that the only words in the statute that can cover him are, 'or to any person acting for or in behalf of the United States in any official function under or by authority of any department or office of the government thereof.' Some meaning must be given to the words 'in any official function.' They seem to me to be words of limitation so that the statute covers not all duties but duties of a kind similar to those of the high functionaries enumerated in it. There must be some employees of the United

States who do not act in an official function. Who are they?

The construction adopted by the Court gives these words no meaning. They might as well or, indeed, better have been omitted, because window cleaners, scrub women, elevator boys, doorkeepers, pages—in short, anyone employed by the United States to do anything is included. Such persons in my opinion are not acting for the United States in an official function.

I think the judgment should be reversed."

For these reasons it is respectfully submitted that the prayer of your petitioner for a writ of certiorari may be granted.

Respectfully submitted,

EDWARD SCHOEN,
Attorney.

HARRISON P. LINDABURY,
Of Counsel.

INDEX.

AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

HARRY KRICHMAN, PETITIONER,
v.
THE UNITED STATES OF AMERICA. } No. 260.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The petitioner was convicted in the United States Court for the Southern District of New York on an indictment (R. 7–9) which charged that, while the Pennsylvania Railroad was under the control of and being operated by the United States, he offered a bribe to a baggage porter employed on said railroad to do an act in violation of the latter's lawful duty, viz, to deliver to the petitioner certain baggage in the custody of the porter and not the property of the petitioner, in violation of section 39 of the Criminal Code of the United States. The facts in the case are thus stated by the Court of Appeals (R. 17, 263 Fed. 540):

> The baggage porter named in the indictment was employed in that capacity by the

Pennsylvania Railroad at its station in the Borough of Manhattan, New York City. The defendant was in the fur business. In November, 1918, he visited the Pennsylvania Station on several occasions and there had conversations with the baggage porter. On the first occasion the defendant inquired about the handling of trunks that passed through the hands of the porter at the station, and suggested that there were opportunities for the porter to make some money. The porter inquired how this could be done. The defendant explained that he would be willing to give the porter money for turning over to him trunks belonging to other people. The porter indicated willingness to consider the proposition and promptly reported the matter to his superiors. About two weeks later the defendant saw the porter at the station concerning a particular trunk, which it turned out had already passed beyond the control of the porter. On the night of that visit the defendant telephoned the porter that another described trunk would arrive at the station the next day. On the following day the defendant appeared at the station and paid the porter $45.00 for delivering the trunk to him. The trunk was placed on a wagon, which was driven away from the Pennsylvania Station on the way to the Grand Central Station. Before the arrival at the Grand Central Station the defendant got on the wagon and was then arrested by a railroad police officer. The trunk contained furs.

The petitioner moved in arrest of judgment (or for a new trial) on the ground that neither the indictment nor the evidence made out any Federal offense. The motion was denied (R. 11; *United States* v. *Krichman*, 256 Fed. 974). On writ of error the judgment was affirmed by the Court of Appeals, Ward, J., dissenting (R. 16; *Krichman* v. *United States*, 263 Fed. 538). Whereupon this court issued a writ of certiorari.

THE STATUTE.

Section 39, Criminal Code, provides as follows:

> Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission

> of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years.

QUESTION INVOLVED.

The only question argued by the petitioner is whether or not a baggage porter, performing the duties of such on a railroad which is being operated by, and is under the possession and control of, the United States by virtue of the act of August 29, 1916, c. 418, §1, 39 Stat. 645, and the proclamation of the President of December 26, 1917, Comp. Stats. 1918, section 1974–a, is within section 39, Criminal Code, as being, during such operation and control, a person acting for or in behalf of the United States in an official function.

ARGUMENT.

I.

During the time of governmental control, the transportation of baggage, from the beginning to the end of the carrier's connection therewith, was a governmental function.

An authoritative statement of the laws and Executive orders bearing upon this matter is given in *Northern Pacific Railway Company* v. *North Dakota*, 250 U. S. 135, 142–144, as follows:

> On the 29th of August, 1916 (39 Stat. 645), Congress gave the President power

"in time of war * * * to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." War with Germany was declared in April, 1917, and with Austria on December 7th of the same year (40 Stat. 1; ib. 429). On December 26, 1917, the President, referring to the existing state of war and the power with which he had been invested by Congress in August, 1916, proclaimed that:

"Under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, (I) do hereby * * * take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon

or operated as a part of such rail or combined rail and water systems of transportation—to the end that said systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers." (40 Stat. 1733.)

By the proclamation a Director General of Railroads was appointed with full authority to take possession and control of the systems embraced by the proclamation and to operate and administer the same. To this end the Director General was given authority to avail himself of the services of the existing railroad officials, boards of directors, receivers, employees, etc., who were authorized to continue to perform their duties in accordance with their previous authority "until and except so far as said Director shall from time to time by general or special orders otherwise provide." Limited by the same qualification the systems of transportation taken over by the Government were made subject to existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof might be located. In addition, however, to the

limitation previously stated the proclamation in express terms declared: "But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such."

In addition, the act of March 21, 1918, c. 25, 40 Stat. 451, confirmed the undivided control thus assumed by the President, providing, moreover, that all operating income, in excess of just compensation to the railroad companies, should remain the property of the United States (section 1), that a revolving fund should be appropriated for the purpose of paying the expenses of Federal control (section 6), and that moneys and other property derived from operation should be the property of the United States (section 12). Section 8 provided that the President might execute any of the powers granted him with relation to Federal control through such agencies as he might determine, and by virtue of this the President, by Proclamation of March 29, 1918, authorized the Director General to issue any orders which might be found expedient in connection with Federal control, and to exercise all the powers which the President was authorized to exercise. (Comp. Stats. 1918, section 3115¾ h.) Under such authority the Director General, as is well known, redistributed offices and functions, fixed wages of labor, and, in general, directed the entire matter of transportation, including the selection of subordinate officials and employees.

There can, therefore, be absolutely no question whatsoever that, in the matter of governmental control of transportation of baggage,

> Congress had taken over to the Government of the United States property to be used in the performance of a governmental function. (250 U. S. 150, 151.)

II.

The baggage porter, in the present case, was acting on behalf of the United States in an official function.

(*a*) As has just been demonstrated, the function of transporting baggage by common carrier, from beginning to end, was a governmental one. But government can only function through and by officers. An office and an officer are thus clearly defined by Chief Justice Marshall in *United States* v. *Maurice*, 2 Brock 96, 102, 103:

> * * * An office is defined to be "a public charge or employment," and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is "an employment," it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the Government, and not by contract, which an individual is appointed by Government to perform, who enters on the duties appertaining to his station, without any

> contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer.

These principles are condensed in *United States* v. *Hartwell*, 6 Wall. 385, 393, where the court said:

> An office is a public station, or employment, conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emolument, and duties.
>
> * * * * *
>
> A Government office is different from a Government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

It will be observed from the above quotations that the baggage porter in the case at bar would have been an officer of the United States were it not for lack of appointment in any of the ways specified in the Constitution. But the fact that the porter was not *strictissimi juris* an officer of the United States does not prevent him from being a person acting in an official function. This must be so, since section 39, Criminal Code, not only includes specifically officers of the United States *nominatim*, but also includes, as something different and additional, persons acting in an official function. It would certainly seem that, since the porter was, speaking generally, an officer, lacking the qualifica-

tion of an officer *of the United States* only because not appointed by the President or by the head of a department, and since he was performing a governmental function, viz., the custody of baggage in transportation, he must have been acting on behalf of the United States in an official function. But, even if this conclusion be not correct, it is submitted that he was acting in *part* of an official function. The governmental function had no limits except the function of the railroads as common carriers, and that in turn covered the custody of baggage at railroad stations as much as anything else. This entire govermental function had to be exercised through official action, and consequently the whole of it, undivided and without limits, was conferred by the President on the Director General of Railroads. There can be no doubt that the Director General was an officer of the United States, and therefore his official function embraced the whole of the governmental function and included the custody of baggage in railroad stations as much as anything else. This can be tested by inquiring whether, if the Director General had seen fit, in any instance, personally to look after the baggage in a certain station, he could be said to have been acting outside the scope of his official duties in so doing. Manifestly not. It being impossible for the Director General to do more than supervise transportation as a whole, his *de jure* undivided function was necessarily subdivided *de facto* and exercised piecemeal by thousands of subordinates, each of whom exercised a part of the

official function of the Director General. He, however, controlled and directed their actions, he hired, paid, and discharged them, he was liable in law for their acts within the scope of the official function (see *Brady* v. *R. R. Co.*, 114 Fed. 100, 107; *Westbrook* v. *Director General*, 263 Fed. 211, 214, 215). Can there be any doubt that, normally, the porter in the case at bar would be correctly said to have been acting on behalf of the Pennsylvania Railroad in part of an official function? If he would be considered to have been so acting normally, then, during governmental control, he was acting in the same capacity on behalf of the United States. In brief, the official function of transportation extends to the custody and delivery of baggage at stations; the baggage porter cares for and delivers such baggage; therefore he performs part of the official function of transportation.

(*b*) Assuming, therefore, that the baggage porter was performing *part* of an official function, the question recurs whether this is sufficient to bring the case within Section 39, Criminal Code. Two conflicting views as to the construction of the statute on this point are before the court in the case at bar, one that of Judge Learned Hand at the trial (R. 12, 256 Fed. 974), and of Judges Rogers and Hough on error (R. 16, 263 Fed. 538); the other that of Judge Ward on error (R. 22, 263 Fed. 544, 545). The former view is best stated by Judge Hand as follows:

> The Director General of Railways is an office or department of the Government

charged with the operation of the railways of the United States, and Zwillinger was acting under his authority. It is, of course, true that he was appointed and discharged by subordinates who were in turn not appointed by an "officer" of the United States, as defined in *U. S.* v. *Germaine*, supra. Nevertheless, although at several removes, he was acting under the authority of the Director General. Moreover, in caring for and dispatching baggage intrusted to the railroad, he was acting on behalf of the United States, since the dispatch of baggage was a duty which the United States had assumed and which only baggage porters could discharge. * * *

It must be conceded that the section would as well cover the case if the words "official function" were omitted, and that it is something of a strain upon the ordinary use of language to speak of a baggage porter's duties as "official." Yet the business of operating a railway is nothing more than that of moving persons and things from one place to another, and a baggage porter actually performs a part of that movement. It is quite impossible to establish any consistent line, based upon the importance of his duties, which will make them any the less "official." Nobody, I should think, would say that a traffic manager had no official functions, or indeed a freight dispatcher, or a ticket seller. At least about them I can see no plausible doubt. With deference there seems to be no basis for the limitation thrown out obiter

by Judge McPherson in *U. S.* v. *Ingham*, supra. No doubt we ought not to press logic to its conclusions, for we are only dealing with common words, but we ought to execute the purposes which the words contain.

If we look at the purpose of the section there seems to me every reason not to draw any line based upon the supposed inaptitude of the words "official function." The section is full of verbiage, no doubt, but its very presence shows its desire for comprehension. The draftsmen certainly wished to include all efforts by corruption to impede the success of the United States in any of its enterprises. All such enterprises are official as soon as the United States lawfully undertakes them, and any interference with them, by debauching those on whom any part of their execution is imposed, is a prejudice to the United States, whether the impediment be grave or trivial. This result is the evil against which the statute is clearly aimed, and it seems to be covered by the use of a phrase like "official function," without undue violence to common use. Indeed, if the importance of the duty delegated be a test, the custody and correct dispatch of valuable baggage is certainly not a trivial function.

In reply to this Judge Ward said:

Some meaning must be given to the words "in any official function." They seem to me to be words of limitation, so that the statute covers, not all duties, but duties of a kind similar to those of the high functionaries

> enumerated in it. There must be some employés of the United States who do not act in an official function. Who are they?
>
> The construction adopted by the court gives these words no meaning. They might as well, or indeed better, have been omitted, because window cleaners, scrubwomen, elevator boys, doorkeepers, pages—in short, anyone employed by the United States to do anything—is included. Such persons, in my opinion, are not acting for the United States in an official function.

It is difficult to add to either of these statements, but certain considerations in favor of the former view may be helpful.

(*c*) There can be no doubt, in view of the difference of opinion noted above, that the statute is ambiguous. When that is the case, it is always permissible to refer to the prior legislation on the subject. Section 39, Criminal Code, was taken verbatim from section 5451, R. S. The latter was mainly taken from section 6 of the Act of February 26, 1853, c. 81, 10 Stat. 171. For purposes of comparison section 39, Criminal Code, and section 6 of the Act of February 26, 1853, c. 81, are here given in parallel columns.

Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the	That if any person or persons shall, [directly or indirectly,] promise, offer, or give, or cause or procure to be promised, offered, or given, any money, [goods, right in action, bribe, present, or reward, or any promise,

payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, contract, undertaking, obligation, or security for the payment or delivery of any money, goods, right in action, bribe, present, or reward,] or any other valuable thing whatever, [to any member of the Senate or House of Representatives of the United States, after his election as such member, either before or after he shall have qualified and taken his seat, or] to any officer of the United States, or person [holding any place of trust or profit, or] discharging any official function under, or [in connection with] any department of the Government of the United States, or under the Senate or House of Representatives of the United States, after the passage of this act, with intent to influence his [vote] or decision on any question, matter, cause, or proceeding which may [then] be pending, or may by law, [or under the Constitution of the United States,] be brought before him in his official capacity, or in his place of trust or profit, and shall be thereof convicted, such

made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years.

person or persons so offering, promising, or giving, or causing or procuring to be promised, offered, or given any such money, goods, right in action, bribe, present, or reward, or any promise, contract, undertaking, obligation, or security for the payment or delivery of any money, goods, right in action, bribe, present, or reward, or other valuable thing whatever, and the member, officer, or person who shall in anywise accept or receive the same, or any part thereof, shall be liable to indictment as for a high crime and misdemeanor in any court of the United States having jurisdiction for the trial of crimes and misdemeanors; and shall, upon conviction thereof, be fined not exceeding three times the amount so offered, promised, or given, and imprisoned in a penitentiary not exceeding three years; and the person convicted of so accepting or receiving the same, or any part thereof, if an officer or person holding any such place of trust or profit as aforesaid, shall forfeit his office or place; and any

> person so convicted under this section shall forever be disqualified to hold any office of honor, trust, or profit, under the United States.

Those portions of section 6 of the Act of February 26, 1853, c. 81, which are omitted from section 39, Criminal Code, are enclosed in brackets. That portion of section 39, Criminal Code, viz, "to induce him to do or omit to do any act in violation of his lawful duty" was taken from section 35 of the Act of July 18, 1866, c. 201, 14 Stat. 186, 187. The preceding portion, viz, "or with intent to influence him to commit or aid in committing or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States" was taken from section 62 of the Act of July 13, 1866, c. 184, 14 Stat. 168, 169. Both of these additions to section 6 of the Act of February 26, 1853, c. 81, show an intention to extend, not to limit, its scope. The provisions in said section 6 covering the bribery of Senators and Representatives were transferred to sections 5450, R. S., and 111, Criminal Code. The converse provisions as to *accepting* bribes in section 6, *supra*, were transferred to sections 5500 and 5501, R. S., sections 110 and 117, Criminal Code. Sections 5501, R. S., and 117, Criminal Code, use the term "capacity" instead of "function," but the two terms evidently have the same meaning for this purpose (*United States* v. *Birdsall*, 233 U. S. 223, 230).

It thus appears that Congress, in the Revision of 1873, and in the Criminal Code, took section 6 of the Act of February 26, 1853, c. 81, omitted certain verbiage, added certain provisions from two later Acts, subdivided it in four different sections, leaving as the result applicable to the case at bar section 5451, R. S., section 39, Criminal Code.

The rule of construction applicable to this situation is thus stated in *McDonald* v. *Hovey*, 110 U. S. 619, 629:

> So, upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law.

And in *Anderson* v. *Pacific Coast S. S. Co.*, 225 U. S. 187, 199, the court said:

> For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed. *United States* v. *Ryder*, 110 U. S. 729, 740; *United States* v. *LeBris*, 121 U. S. 278, 280; *Logan* v. *United States*, 144 U. S. 263, 302; *United States* v. *Mason*, 218 U. S. 517, 525.

It will be observed that section 6 of the act of February 26, 1853, c. 81, included, not only any person discharging an official function under or in connection with any department of the Government, but also any person "holding any place of trust or profit" under or in connection with such department. Applying the rule of construction laid down

in the authorities cited above, it must be presumed that the mere rearrangements and omissions of redundant language made in the Revision of 1873 did not alter the meaning of the prior act, nor exclude from its scope persons who were previously within it. Not only is there no reason in the language of the Revision or in considerations of public policy to rebut this presumption, but, on the contrary, certain important language in the Revision and Code seem to make it certain that the meaning is not changed. For when the Revision and Code come to speak of the essential effect of the bribe in its influence on the person bribed, they both include, not merely matters brought before him "in his official capacity," but also matters brought before him "in his place of trust and profit," and later expand even this to cover the whole of "his lawful duty."

The words "acting in any official function" in sections 5451, R. S., and 39, Criminal Code, must, therefore, be read to include acting "in any place of trust or profit," both to conform to the prior law and to harmonize the provisions of the present law.

But, if this be done, it would seem that there can be no doubt about the case at bar. Certainly the baggage porter held a place of trust or profit under the United States. As has been shown, the Government was responsible for the transportation of baggage. To carry out this responsibility, it used various subordinates of every character, directed and controlled their actions, prescribed their duties, hired, discharged, and paid them. In brief, it was responsible for all

their actions in the line of duty, and necessarily, therefore, each and every of them held a place of profit under the Government.

(*d*) Even if it be impossible, in the construction of section 39, Criminal Code, to look at the language of section 6 of the act of February 26, 1853, c. 81, still the former should receive a liberal construction to carry out its main intent, viz, to protect the Government organization as a whole from corruption. It is just as important to the public interests to prevent or punish bribery of a person exercising part of an official function, as of one exercising the whole. Corrupt interference with the working of government as a whole is the evil, not merely corrupt interference with such working when grouped in the unit of an entire official function exercised by one person. The construction placed by Judge Ward on the statute is exceedingly limited. In effect he confines "acting in an official function" to *de facto* officers, although it would seem that the term "officers of the United States" would include all persons in fact exercising the whole of an official function, whether *de jure* or not. Nor do the examples given by Judge Ward of the results of a liberal construction seem very formidable. There seems nothing absurd or extreme in making the statute cover, e. g., a janitor or charwoman who, for a bribe, admitted a thief, or a stenographer who sold department correspondence, or a messenger who, for a bribe, failed to deliver an important letter or paper.

(*e*) The authorities, so far as they go, are all in favor of a liberal construction of section 39, Criminal Code, and there is none to the contrary. (*Benson* v. *Henkel*, 198 U. S. 1, 11, 12; *Haas* v. *Henkel*, 216 U. S. 462, 480, 481; *United States* v. *Birdsall*, 233 U. S. 223, 230, 231; *United States* v. *Van Leuven*, 62 Fed. 52, 66; *United States* v. *Ingham*, 97 Fed. 935, 936; *Sharp* v. *United States*, 138 Fed. 878; *United States* v. *Haas*, 168 Fed. 908.)

III.

Section 7 of the Legislative, Executive and Judicial Appropriation Act of March 1, 1919, c. 86, 40 Stat. 1267, 1268, has no bearing on the construction of Section 39, Criminal Code.[1]

(*a*) The section referred to granted a bonus to all civilian employees of the United States who received compensation at the rate of $2,500 per annum or less, and then provided that —

> The provisions of this section shall not apply to employees of the railroads, express companies, telegraph, telephone, marine cable, or radio system or systems, taken over by the United States, and nothing contained herein shall be deemed a recognition of the employees of such railroads, express companies, telegraph, telephone, marine cable, or radio system or systems, as employees of the United States.

(*b*) Evidently this proviso can not be construed as enacting for all purposes that employees of the railroads taken over by the United States are not em-

[1] The same provision was in section 6 of the appropriation act July 3, 1918, c. 130, 40 Stat. 815.

ployees of the United States, much less that they are not persons acting on behalf of the United States in an official function. All that the section can correctly be taken to mean is that, if such persons are *not*, at that time, legally employees of the United States, section 7 shall not be taken to make them such. The question whether, apart from section 7, they are legally such employees or not is left entirely open and unaffected.

(*c*) Even if section 7 *supra*, could be taken as an expression of opinion by Congress that employees of the railroad were not legally employees of the United States, such expression could not alter the law. "The rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it. Endlich, Interpretation of Statutes, section 372." (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 162). The statement given above as to the legal relations between the United States and those persons, from the Director General down, who operated the railroads under Federal control demonstrates that such persons were employees of the United States. For example, if baggage was lost or destroyed through the negligence of the baggage porter, the United States would have been liable for the damage because of the rule, *respondeat superior*. There was a privity of contract and of status between the United States and the porter, and his pay came from the Treasury of the United States. If he was not an employee of the United States, that term has lost its ancient meaning.

(*d*) Even if it were possible to regard the porter as not an employee of the United States, that would not affect in any way whatsoever his status as a person acting on behalf of the United States in an official function. This is shown by the fact that a person may be *an officer* of the United States and yet not an employee thereof, because not paid directly by the United States. For example, a deputy clerk of a United States court, or a deputy marshal of the United States is an officer of the United States. (*Confiscation Cases*, 20 Wall. 92, 111; *United States* v. *Matthews*, 173 U. S. 381, 387; *United States* v. *Tinklepaugh*, 3 Blatch. 425, 430; *United States* v. *Martin*, 17 Fed. 150, 153); but he is not an employee of the United States because his employment and compensation are derived from the clerk or marshal (*United States* v. *Meigs*, 95 U. S. 478; *Douglas* v. *Wallace*, 161 U. S. 346, 348; *United States* v. *McDonald*, 72 Fed. 898; *Matthews* v. *United States*, 32 Ct. of Clms., 123, 133, 134).

A fortiori, a person may be acting on behalf of the United States in an official function, though not an employee thereof.

CONCLUSION.

The judgment of the United States Court of Appeals for the Second Circuit should, therefore, be affirmed.

R. P. STEWART,
Assistant Attorney General.
W. C. HERRON,
Attorney.

○